Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
LEVEL 3 COMMUNICATIONS, LLC	)	
	)	WC Docket No. 09-153
Petition for Declaratory Ruling That Certain	)	
Right-of-Way Rents Imposed by the New	)	
York State Thruway Authority Are	)	
Preempted Under Section 253	)	

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Craig J. Brown
Meshach Y. Rhoades
Suite 950
607 14th Street, N.W.
Washington, DC 20005
303-383-6644
Craig.brown@qwest.com
Meshach.rhoades@qwest.com

Attorneys for

QWEST COMMUNICATIONS
INTERNATIONAL INC.

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I. INTRODUCTION AND SUMMARY[1]

On July 23, 2009, Level 3 Communications, LLC ("Level 3") filed a petition with the Commission requesting that the Commission preempt certain charges that the New York State Thruway Authority (NYSTA) levies in exchange for access to the rights-of-way under its control pursuant to Section 253 of the Federal Telecommunications Act of 1996. The NYSTA is demanding that Level 3 pay annual right-of-way fees that range from $78.00 to more than $34,000 per foot, which constitutes an increase of 180 to 725 times the prevailing rates for access to the rights-of-way.

Like Level 3, Qwest -- providing services through its subsidiaries and affiliates -- requires access to state and local rights-of-way throughout the country in order to provide service to its customers. Qwest has also seen a dramatic up-tick in excessive right-of-way fee demands by local governments in recent years, not unlike the demands made by the NYSTA here. Level 3's petition is simply representative of a much larger, and rapidly growing, problem across the

[1] In its September 18, 2009 Order, the Commission extended the time to comment on the Level 3 petition to October 15, 2009, and set the deadline for reply comments on November 5, 2009. *See* Order, DA 09-2081.

United States. The deployment of telecommunications and broadband services is being significantly deterred by these fees, which is fundamentally inconsistent with the pro-competitive, deregulatory purposes of the Act and the preemptive scope of Section 253 of the Act.

Over 10 years ago the Commission ruled in a widely cited case that Section 253 preempts any legal requirements, including right-of-way fees, that "materially inhibit[] or limit[] the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *In re Cal. Payphone Ass'n*, 12 FCC Rcd 14191, 14206 ¶ 31 (1997). Courts throughout the nation have interpreted and applied the *California Payphone* standard to preempt excessive fees and large fee increases, even when the fees are nowhere near as outlandish as the ones the NYSTA is seeking to impose. Such fees, these courts have held, violate Section 253 if they impact competition, are discriminatory, or constitute a material increase in fees.

The Commission should reaffirm this standard, and apply it in this case and in cases throughout the country. It is critical, however, that the Commission make clear that this standard does not require the sort of extreme fees at issue here. The Commission's ruling should reinforce the broad scope of the "materially inhibit or limit" standard adopted in *California Payphone*, so that any fee structure or fee increase that materially inhibits or limits the deployment of telecommunications services triggers the application of Section 253(a). At that point, the burden would then shift to local government to show that the fees satisfy the narrow criteria in Section 253(c). Without such an interpretation of the Act, the Congressional purposes of the Act will be thwarted and entities like NYSTA will never have to establish that their fees are indeed lawful under Section 253.

II. DISCUSSION

A. State And Local Governments Are Increasing Right-Of-Way Fees In A Manner That Prohibits The Provision Of Telecommunications Services.

Like Level 3, Qwest provides local and long-distance wire-line services, broadband, and WiFi telecommunications service throughout the United States. Qwest's provision of these services to cities and their residents is consistent with the purposes and direction of the Act and the FCC's recent Broadband Initiative. But, these services can only be provided if companies like Level 3 and Qwest have fair and consistent access to the public rights-of-way in the cities in which they operate.

Local governments, which exercise monopoly control over their rights-of-way, are impeding and prohibiting the provision of services through excessive fees and fee increases that are sometimes massive in nature. These fees and fee increases have accelerated at a faster pace over the past few years and have become an acute problem for Qwest, which has been forced to litigate over these fees in forums from the east coast to the west coast. If left unchecked, these regulations will undermine the long-term development of the telecommunications and broadband infrastructure and technology. This is plainly seen in the following recent instances.

1. The Elephant Butte Irrigation District.

The Elephant Butte Irrigation District (EBID) operates canals that provide water to farmers throughout much of New Mexico. Falling short on revenue, EBID adopted a new fee schedule in 2005 that increased its charges to $0.25 per linear foot for use of the rights-of-way running parallel to EBID's canals, and to $0.50 per linear foot for the use of rights-of-way that cross EBID's canals. These new fees constituted increases of 2,400 percent and 233 percent over the old fee structure. *See* Attachment 1 (Decl. of William Fitzsimmons, filed in *Qwest Corp. v. Elephant Butte Irrigation Dist.*, Case No. CV07-163 MV/WDS (D.N.M.)) ¶ 5. Two

years later, in 2007, EBID again changed its fee schedule to charge a flat rate for crossings of $2,250 for the first 50 feet (with an additional $250 for each additional 50 feet), and $0.15 per linear foot for parallels. This resulted in increases of more than 1,000 percent over the pre-2005 fees for crossings and more than 1,400 percent over the pre-2005 fees for parallels. *See id.* ¶¶ 25-30. It was admitted in discovery that these increases were designed to raise revenue. In fact, EBID acknowledged that it had not even conducted an analysis of the costs of providing access to its rights-of-way.

The new right-of-way fees were prohibitory, often exceeding the combined costs associated with placing telecommunications facilities on a particular job, and on several occasions, were sufficiently high to prevent Qwest from recovering the expenses associated with providing services to its customers. *See id.* ¶¶ 6-11. For example, on one particular job providing six simple service drops to customers' homes, Qwest would have had to charge approximately $80 per line per month for 25 years to recoup the costs of EBID's permit fee alone. *See id.* ¶ 11. To put this in perspective, Qwest's tariff rate is approximately $20 per month for these lines, making it impossible for Qwest to ever recover the costs associated with this permit. *Id.* If these fees were applied state-wide, Qwest's costs of providing service would have increased by 776 percent for right-of-way fees alone, reducing Qwest's income in the state by approximately 45 percent. *See* Attachment 2 (Decl. of Margaret Lynn Norsworthy, filed in *Qwest Corp. v. Elephant Butte Irrigation Dist.*, Case No. CV07-163 MV/WDS (D.N.M.)) ¶¶ 11-13. Qwest was forced to file a lawsuit in the federal district court of New Mexico challenging these new right-of-way fees. EBID was eventually enjoined from enforcing its revised fee schedules, but only after a long and expensive legal struggle. *See Qwest Corp. v. Elephant Butte Irrigation Dist.*, 2009 WL 2252199, at *1-2. (D.N.M. May 19, 2009).

2. The Maryland-National Capital Park & Planning Commission.

The Maryland-National Capital Park & Planning Commission administers a large park system just outside of Washington D.C., including land that is adjacent to major thoroughfares and is used by carriers and other utilities for right-of-way. In negotiations for a new license agreement to be effective in 2007, the Commission initially demanded $4.20 per linear foot per conduit for Qwest's use of the rights-of-way. *See* Attachment 3 (Second Amended Complaint, filed in *Qwest Commc'n Corp. v. Maryland-National Capital Park & Planning Comm'n*, Civil Action No. RWT-07-2199), ¶ 3; Attachment 4 (Plaintiff's Resp. to First Set of Interrogatories, filed in *Qwest Commc'n Corp. v. Maryland-National Capital Park & Planning Comm'n*, Civil Action No. RWT-07-CV-2199), Resp. to Inter. No. 7. The impact on Qwest would have been an annual payment of $37,254 for two conduits occupying less than one mile of right-of-way in park land. *See* Attachment 3 ¶ 4. During negotiations, however, the Commission increased its demand to $26.00 per linear foot per conduit. *See id.* ¶¶ 5, 47; Attachment 4 at Resp. to Inter. No. 7. This constituted a 600 percent fee increase, and would have resulted in an annual payment of $230,620 for the same amount of use. *See* Attachment 3 ¶¶ 5, 47. Qwest was forced to bring a lawsuit under Section 253 of the Act to declare the proposed rate unlawful. *See id.* ¶¶ 10, 45. During the pendency of the lawsuit, other carriers occupying the park rights-of-way decided to vacate the rights-of-way, and Qwest had no choice but to join this project and vacate the rights-of-way in order to mitigate construction costs. *See* Attachment 4 at Resp. to Inter. No. 7. This decision was solely due to the fact that no company could reasonably afford to pay the exorbitant fees the Commission was seeking to charge. Qwest's costs for building around the park exceeded $400,000, all of which is now unavailable for other projects.

3. The City of Santa Fe, New Mexico.

The City of Santa Fe similarly adopted new right-of-way regulations that substantially increased Qwest's costs of operating in the City. Prior to the new regulations, Qwest was paying a two percent gross-revenue fee for access to the City's rights-of-way. The City's new regulations required Qwest to pay, among other payments, a $6,000 annual rental fee for a single four-by-four cabinet in the right-of-way. *See Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1262, 1270-71 (10th Cir. 2004); *see also* Attachment 5 (Decl. of William Fitzsimmons, filed in *Qwest Corp. v. City of Santa Fe*, No. Civ. 00-795 LH) ¶ 7. Qwest estimated that it had approximately 365 similar cabinets in the City, and thousands of smaller cabinets. *See Santa Fe*, 380 F.3d at 1262-63. These rental fees alone would have quadrupled Qwest's costs of doing business city-wide. *See id.* at 1270-71. In addition, the new regulations would have increased Qwest's fees by 30-59 percent for conduit installation. *See id.* at 1262-63.

Qwest was again forced to bring a lawsuit under Section 253 of the Act, to prevent the enforcement of these new fees; otherwise Qwest could not have afforded to provide services in the City. *See* Attachment 5 (Fitzsimmons Decl.) ¶¶ 8-9 (City's fee and in-kind requirements "create economic inefficiencies by distorting investment decisions of telecommunications providers"). Striking down the City's fee requirements, the Tenth Circuit held that fees that "create a massive increase in cost[s]" are "prohibitive" under Section 253. *Santa Fe,* 380 F.3d at 1271-73. Rejecting Santa Fe's argument that a "mere increase in cost cannot be prohibitive," the court stated that "[i]t is enough that the Ordinance would 'materially inhibit' the provision of services." *Id.* at 1271 (*quoting California Payphone Ass'n*, 12 FCC Rcd at 14206 ¶ 31).

4. The City of Deming, N.M.

Some cities are taking excessively aggressive actions to raise new revenue from telecommunications providers. The City of Deming, New Mexico, for example, sought to

increase its right-of-way fees in 2007. When Qwest objected to the new franchise and fee schedule, the City filed a criminal complaint against Qwest, claiming that Qwest's failure to enter into the new franchise and pay the new franchise fee was a criminal violation. *See* Attachment 6 (*Deming v. Qwest Comm. Intern. Inc.*, Criminal Complaint (July 3, 2007)). The City sought a $500 fine and/or 90 days' imprisonment for each day that Qwest failed to sign the new franchise. *See* Deming City Code §§ 8-5-1B, 8-5-2, 1-4-1A. The parties eventually resolved the dispute, but this exemplifies the aggressive actions cities are now taking to raise new revenue.

B. The Upsurge In Prohibitory Fees By State And Local Governments Is Likewise Preventing Broadband Deployment.

For Qwest and others like it, the consequences of the increase in prohibitory fees are particularly acute in the context of broadband deployment because ubiquitous coverage will require sizable right-of-way work to place, improve, or maintain the necessary facilities that will serve customers nationally. Notice of Inquiry, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, FCC 09-31, ¶ 3 (Apr. 8, 2009) (*Broadband NOI*) (although "[b]oth wireless and wireline broadband providers continue to upgrade their networks to provide additional broadband capabilities and services to existing and potential consumers[,] . . . there is much work to be done"). Because of the national scope of such networks, local governments are less restrained in holding carriers hostage to exorbitant monopoly rates, knowing that the consequences for the carrier not installing its facilities and paying such rates would result in service deprivation or reduction to nameless, faceless customers in other parts of the country. As above, this is seen in the following example.

In December 2007, Qwest was told that, due to city layoffs, the city of Mesa, Arizona was implementing a new permit structure and increasing its permit fees. *See* Attachment 7

(Declaration of Gale R. Perko) ¶ 4. Up until this time, Qwest was paying approximately $100 for a permit. *Id.* The city increased the permit fee to $510 per page of each application. *Id.* Each job for Qwest typically requires three pages. *Id.* Thus, the new fee increased Qwest's costs from $100 to $1,530 per permit. *Id.*

The city of Mesa stated that the new turn-around time for issuing permits under the revised structure would be 12 days. *Id.* ¶ 5. Qwest often needs permits on a much quicker basis. *Id.* Part of the city's new pricing structure included increased fees for faster turn-around times. *Id.* Under this schedule, Qwest must pay $1,030 per page for a turn-around time of 6 days and $1,545 for a turn-around time of 3 days. *Id.* Since a typical job requires three pages, Qwest is thus forced to pay $4,635 for a single permit with a 3 day turn-around time to deploy broadband facilities to a single client. *Id.*

Approximately 6 months later, in June 2008, the City again notified Qwest that it was increasing its previous fee increase to $710 per page, effective July 1, 2008. *Id.* ¶ 6. The City also tacks on a 4 percent technology fee to every permit. *Id.* Qwest's average permit fee now exceeds $2,130 per permit. *Id.* In less than two years, in other words, permit fees in the city of Mesa have increased from $100 in excess of $2,130 for an average permit with a turn-around time of 12 days. *Id.* ¶ 7. The cost are greater for fees with a faster turn-around time. As a result of these increases, Qwest's permit costs in the city of Mesa have increased from $9,597.31 in 2007 to $627,849.60 in 2008. *Id.*

There is no rational relationship between Qwest's use of the City's rights-of-way and the City's new permit fees, and the City has not provided one. *Id.* ¶ 8. Mesa's new fee structure has impeded the deployment of broadband services in the City, and continues to do so. *Id.* Funds

which were formerly expended to deploy broadband are now being expended on those excessive fees. *Id.*

C. The FCC's *California Payphone* Standard, Which Promotes Competition By Prohibiting Fees And Fee Increases That Materially Inhibit Or Limit The Provision of Services, Should Be Applied Across The Nation.

In its *California Payphone* decision, the Commission previously adopted a standard under Section 253(a) of the Act that prohibits excessive fees and fee increases, such as the fees the NYSTA and other local governments are now seeking to impose. *See California Payphone*, 12 FCC Rcd at 14206 ¶ 31. The standard precludes any state and local fees that have the "'effect of prohibiting' the ability of any entity to provide" telecommunications service if it "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *Id.* (citation omitted). To be sure, state and local governments are permitted to adopt fees that are "fair and reasonable" under Section 253(c), but only so long as they are also on a "competitively neutral and nondiscriminatory basis . . . ." 47 U.S.C. § 253(c). In other words, a fee regulation survives the broad preemptive scope of Section 253(a) only if a local government, to whom the burden of proof shifts, can show that its fees are fair, reasonable, competitively neutral, and non-discriminatory. *In re TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd 21396, 21441-42 ¶ 105 (1997) (burden shifted to government "to justify [its regulations] under section 253(c) on the grounds that they are within the scope of permissible local rights-of-way management authority").

It is vitally important that the Commission re-emphasize that the preemptive scope of Section 253(a) is very broad and a carrier's burden of proof under this Section is light, while the savings clause in Section 253(c) is narrow and the local government's burden is heavy. This is important because local governments are now arguing that, unless a carrier can prove that local fees are prohibitory under Section 253(a), evidence that a fee is unfair, unreasonable, anti-

competitive, or discriminatory under Section 253(c) is irrelevant. A court does not get to the evidence of a violation of Section 253(c), the argument goes, unless a carrier meets its extremely difficult task of proving that it is virtually prohibited from providing services under Section 253(a).

This argument is often coupled with the position that a carrier must show a literal prohibition or nearly absolute prohibition to establish a violation of Section 253(a), which is exactly what has taken place in the city of Portland where the Ninth Circuit has now decided that a state or local regulation that does not expressly prohibit the provision of telecommunications services is preempted only if it prevents a provider's "continued operation." *See* Attachment 8 (Memorandum of the United States Court of Appeals for the Ninth Circuit Filed on April 8, 2009). Neither the FCC nor any other circuit has required a company to show it is unable to operate before applying the protections of the Telecom Act. By wrongly increasing the standard under subsection (a), local governments hope to avoid the Congressional limitations imposed by subsection (c). Such advocacy is directly contrary to the purposes and goals of the Act and Section 253, which, being designed to create a "pro-competitive, de-regulatory national policy framework," H.R. Rep. No. 104-458, at 113 (1996), is considered by Congress to be a "very, very broad prohibition against State and local" regulation of telecommunications companies. *See* 141 Cong. Rec. S8206, S8212 (daily ed. June 13, 1995) (comments of Sen. Gorton); *see also TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd at 21440 ¶ 101 (Section 253 is "an important and powerful tool" to encourage telecommunications coverage and ubiquitous broadband deployment); *In re Public Utility Commission of Texas*, 13 FCC Rcd 3460, 3469 ¶ 21 (1997) (Section 253 "establish[es] a statutory framework to eliminate state and local measures that thwart the development of competition"). It is also contradictory to the *California Payphone*

standard, which has been repeatedly embraced and applied by federal circuit courts throughout the country. These jurisdictions have interpreted the standard to preempt fees that "impede[] the provision of telecommunications service," *Verizon Commc'ns Inc. v. FCC*, 535 U.S. 467, 491 (2002), such as fees that impact competition, discriminatory fees, and material increases in fees.

In *Puerto Rico Telephone*, for example, the First Circuit relied on the *California Payphone* standard to invalidate a local ordinance that imposed a 5 percent fee on gross revenues from all telephone calls originating within the locality because the ordinance "negatively affect[ed] [the provider's] profitability"; gave rise to "a substantial increase in [the provider's] costs"; and "place[d] a significant burden on [the provider]," thereby "strain[ing the carrier's] ability to provide telecommunications services." *P. R. Tel. Co. v. Municipality of Guayanrila*, 450 F.3d 9, 18-19, 11-12, 23-24 (*citing, inter alia, California Payphone*, 12 FCC Rcd at 14206 ¶ 31) (holding that relevant inquiry is whether "the [regulation] materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment"). *Id.* at 18. Moreover, the court held that the potential impact on Puerto Rico Telephone's profitability, if the disputed right-of-way fees were expanded and applied by all municipalities in the commonwealth, was compelling. *Id.* at 16-18; *see also Santa Fe*, 380 F.3d at 1270-71 (finding rental fee unlawful based on potential impact if expanded and applied city-wide); *Qwest Corp. v. Elephant Butte Irrigation Dist.*, 616 F. Supp. 2d 1110, 1116-17 (D.N.M. 2008) (admitting testimony of potential impact of fee scheme if applied state-wide).

Similarly, in *TCG New York, Inc. v. City of White Plains*, the Second Circuit held that the test under Section 253(a) is whether a regulation "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." 305 F.3d 67, 76 (2d Cir. 2002) (*quoting California Payphone*, 12 FCC Rcd at

14206 ¶ 31). Like the First Circuit, the court proceeded to invalidate a local ordinance that imposed a gross-revenue-based right-of-way fee in a discriminatory manner. *Id.* at 79. With regard to these assessments, the circuit stated, "disparate treatment is plainly not 'competitively neutral and nondiscriminatory.'" *Id.* (citation omitted). "If [one provider] is required to pay five percent of its gross revenues to the City and [another provider] is not, competitive neutrality is undermined. [One provider] will have the advantage of choosing to either undercut [the other]'s prices or to improve its profit margin relative to [the other]'s profit margin." *Id.* The court concluded that the ordinance was preempted because it would pose "obstacles . . . to [the challenging provider's] ability to compete in [the locality] on a fair basis." *Id.* at 76-77.

The Tenth Circuit similarly held that the relevant inquiry under Section 253(a) is whether a regulation "would 'materially inhibit' the provision of [telecommunications] services" in *Santa Fe*, 380 F.3d at 1271 (*quoting California Payphone*, 12 FCC Rcd at 14206 ¶ 31). Applying the *California Payphone* standard, the court invalidated a local fee regulation that quadrupled a provider's rental fees and increased its installation costs by 30 to 59 percent. *Id.* The court held that "not every increase in costs creates a prohibition within the meaning [of] § 253[,]" but that "[i]t is enough that the Ordinance would 'materially inhibit' the provision of services." *Id.* (citation omitted). To be "fair and reasonable," the court stated, fees assessed in exchange for use of municipal rights-of-way must take into account a telecommunications provider's "limited use" of the rights-of-way and the "non-exclusive nature" of that use. *Id.* at 1272-73.

In short, the *California Payphone* standard should not be read to require that fees or fee increases be exorbitant to satisfy Section 253 preemption. Instead, the relevant determination is whether the fees "materially inhibit[] or limit[]" Level 3 from "compet[ing] in a fair and balanced legal and regulatory environment." *California Payphone*, 12 FCC Rcd at 14206 ¶ 31.

Carriers can satisfy this standard by showing that the local government's fees negatively impact competition, they are applied in a discriminatory manner, or there are material increases in fees. Once a carrier has made this showing, the burden shifts to the local government to show that its fees are fair, reasonable, competitively neutral, and nondiscriminatory. This burden is very high by necessity, to satisfy the pro-competitive deregulatory purposes of the Act and Section 253. To meet its burden, most circuits have held that local government must provide, at a minimum, evidence that its fees are related to the actual use of the rights-of-way, the extent of a carrier's use of its rights-of-way, the nature of a carrier's use of the rights-of-way, the costs of maintaining the rights-of-way, and the impact of its fees on competition. *See, e.g., Elephant Butte Irrigation Dist.*, 616 F. Supp. 2d at 1119; *P. R. Tel.*, 450 F.3d at 21-22; *Santa Fe*, 380 F.3d at 1270, 1272-73; *In re Silver Star Tel. Co.*, 13 FCC Rcd 16356, 16361-62 (1998). Without this evidence, a local government's burden under Section 253(c) is not met.

III. CONCLUSION

Telecommunications companies are seeing an up-tick in local right-of-way fee demands throughout the nation. While the FCC is seeking to improve the deployment of telecommunications and broadband services throughout the nation, these demands are prohibiting the provision of services. These prohibitions are only exacerbated by the local governments' strategy of interpreting Section 253 in a manner that creates a tremendous burden under subsection (a) so that courts never reach a ruling under subsection (c) that the local fees are not fair, reasonable, competitively neutral, or nondiscriminatory. The Commission should adopt the *California Payphone* standard and apply it in a manner that prohibits fees that impede competition, are discriminatory, and result in excessive fee increases. Only by recognizing the broad preemptive scope of Section 253(a) and the narrow savings clause under Section 253(c)

will the standard adhere to the pro-competitive, deregulatory purposes of the Act and Section 253.

Respectfully submitted,

QWEST COMMUNICATIONS
INTERNATIONAL INC.

By: /s/ Meshach Y. Rhoades
Craig J. Brown
Meshach Y. Rhoades
Suite 950
607 14th Street, N.W.
Washington, DC 20005
303-383-6644
Craig.brown@qwest.com
Meshach.rhoades@qwest.com

Its Attorneys

October 15, 2009

CERTIFICATE OF SERVICE

I, Ross Dino, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be: 1) filed with the FCC via its Electronic Comment Filing System in WC Docket No. 09-153; 2) served via email on the Competition Policy Division, Wireline Competition Bureau, Federal Communications Commission at CPDcopies@fcc.gov; and 3) served via email on the FCC's duplicating contractor, Best Copy and Printing, Inc. at fcc@bcpiweb.com.

/s/ Ross Dino

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